the Executive Branch – would itself have created a circuit split on this issue.

Because the cases cannot be viewed as myopically as Japan urges, the issues decided by the D.C. Circuit ***are*** likely to recur. Indeed, both the Eleventh Circuit and the Ninth Circuit have recognized the conflicting results reached by different courts that have considered the application of the political question doctrine to the large number of World War II-era cases currently in the federal courts. *See Ungaro-Benages*, 379 F.3d at 1236 & n.12; *Alperin*, 410 F.3d at 546-47.[2]

B. Japan Fails to Distinguish *Japan Whaling* and Cases in Which Circuit Courts Have Construed Foreign Treaties.

Japan also attempts a tortured distinction among the circuit court cases involving the interpretation of foreign treaties. This attempt similarly fails to explain away the conflict created by the D.C. Circuit's refusal to interpret the foreign treaties.

Japan claims *Prewitt Enterprises, Inc. v. O.P.E.C.*, 353 F.3d 916 (11th Cir. 2003), is irrelevant to a circuit split because it involved the interpretation of Austrian law. Opp. Cert. at 21. However, the Austrian law interpreted in *Prewitt*

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[2] Japan also claims support from state court cases determining that a California statute, Cal. Civ. Proc. Code § 354.6 (1999), which created a private cause of action for claims of World War II slave labor, exceeded that state's foreign affairs power. Opp. Cert. at 15-16. The question whether a state statute that provided a cause of action for violations of international law exceeded states' foreign relations powers – a question of federal-state relations – is not relevant to the instant case, which concerns whether claims asserted under federal statutes are nonjusticiable under federal separation of powers principles. *See Baker v. Carr*, 369 U.S. 186, 210 (1962).

directly incorporated the headquarters agreement between OPEC member states and Austria. *Prewitt*, 353 F.3d at 919. Thus the Eleventh Circuit interpreted a foreign agreement involving several foreign states, and Japan fails to explain how this is consistent with the D.C. Circuit's refusal to interpret the foreign agreements at issue here.

Japan also claims that the court's interpretation of foreign agreements in *Ungar v. P.L.O.*, 402 F.3d 274 (1st Cir. 2005), is consistent with the D.C. Circuit's application of the political question doctrine because the Executive Branch did not submit a statement of interest opposing interpretation in that case. Opp. Cert. at 21. Again, Japan attempts to reduce the political question doctrine to a function of the Executive's views. If, however, the political question doctrine depends on more than the Executive's views (and even Japan protests that the D.C. Circuit's deference to the Executive Branch was not absolute), then the Circuit Courts' willingness to interpret foreign agreements under the doctrine is a separate question from whether the Executive Branch actively opposed adjudication. Under this view, the First Circuit's determination in *Ungar* that the political question doctrine did ***not*** apply is indeed in conflict with the D.C. Circuit, because the First Circuit so held in spite of the necessity of interpreting agreements far more controversial and likely to interfere with an active foreign conflict and ongoing diplomatic efforts by the United States, than the World War II agreements – and the absence of diplomatic action – present here. *See id.* at 280 (rejecting defendants' argument "presum[ing] that the district court intruded into forbidden territory when it interpreted an array of United Nations resolutions and Israeli-PLO agreements in a politically controversial manner").

Similarly, Japan's contention that the interpretation of the foreign treaty in *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000),

is consistent with the D.C. Circuit's refusal to interpret the treaties here, merely because in *Sea Hunt* the parties to the treaty agreed on the treaty's interpretation, makes little sense. Opp. Cert. at 21. It can hardly be the case that courts may interpret treaties only when their meaning is already settled.

In addition, Japan cannot explain how the D.C. Circuit's approach is consistent with *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 229-30 (1986). *Japan Whaling* instructed courts to interpret treaties and statutes even if the results conflict with Executive Branch policy and actions. *Id.* *Japan Whaling's* holding is thus relevant in that it holds a federal court must still interpret and apply the law even when doing so may conflict with executive action or agreements in the foreign policy arena. *Id.* at 230. The D.C. Circuit's decision cannot be reconciled with this principle.

II. Contrary to Japan's Contention, Addressing the Political Question Issue Prior to Subject Matter Jurisdiction Was Not Appropriate, and Subject Matter Jurisdiction Exists Over Petitioners' Claims.

Although the issue is not raised in the Petition, Japan contends that it was appropriate for the Circuit Court to consider whether the political question doctrine barred Petitioners' claims before addressing whether the district court had subject matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA). Opp. Cert. at 22 n.11. Petitioners believe the court below erred in failing to consider subject matter jurisdiction under the FSIA before considering the political question issue. *See Powell v. McCormack*, 395 U.S. 486, 512 (1969) (there is a difference "between determining whether a federal court has 'jurisdiction of the subject matter' and whether a cause over which a court has subject matter jurisdiction is 'justiciable.'"); *Johnsrud v. Carter*, 620 F.2d 29, 32-33 (3d

Cir. 1980). *But see Whiteman*, 431 F.3d at 70 (addressing justiciability before addressing immunity under the FSIA) (citing *Hwang Geum Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005)).

Japan also hints repeatedly that this Court should deny certiorari because Japan is immune from suit under the FSIA. Opp. Cert. at 5, 24. Petitioners believe that if the Circuit Court had addressed the issue of whether Japan's operation of for-pay brothels falls under the commercial activities exception to the FSIA, it would have held Japan is not immune from suit. Nevertheless, the Court should disregard Japan's attempt to complicate the political question issues in this case with its foreign sovereign immunities argument, because the issue is not currently before the Court. If the Court decides that the Circuit Court should have considered subject matter jurisdiction before considering the political question issue, the proper course is to remand the case to the Circuit Court to consider the immunity issue.

Finally, Japan mischaracterizes Petitioners' separation of powers claim as suggesting that the political question doctrine is inapplicable to cases involving the FSIA or the ATCA. Opp. Cert. at 23. In fact, Petitioners argue separation of powers is implicated, not by the political question doctrine itself, but by the D.C. Circuit's decision to treat the Executive's views as dispositive. Thus, the case raises the question whether the foreign affairs power of the Executive may supersede – through blanket judicial deference – statutory schemes set forth by Congress. The Court should grant the Petition to resolve the circuit split on these important questions.

Dated: January 10, 2006

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